FILE COPY

Supreme Court, U. S.
FILED
FEB 13 1940
CHARLES ELMORE CROPLEY
CLERK

No. 559

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JULIAN PRICE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	4
Specification of errors to be urged	8
Summary of Argument	9
Argument	9
Conclusion	19

CITATIONS

Cases:

Ball-Thrash v. *McCormick*, 162 N. C. 471 — 16

Burnet v. *Huff*, 288 U. S. 156 — 11, 12

Burnet v. *Logan*, 283 U. S. 404 — 11, 12

Burns Mfg. Co. v. *Commissioner*, 59 F. (2d) 504 — 10, 15

City Bank Farmers' Trust Co. v. *Bowers*, 68 F. (2d) 909 — 16

Crain v. *Commissioner*, 75 F. (2d) 962 — 17, 18

Eckert v. *Burnet*, 283 U. S. 140 — 9, 10, 11, 12, 13, 14, 15, 18

Ferris v. *Commissioner*, 38 B.T.A. 312 aff'd. 102 F. (2d) 985 — 11, 14, 19

Goldstein v. *Rusch*, 56 F. (2d) 10 — 16

Hart v. *Commissioner*, 54 F. (2d) 848 — 12, 13

Insurance Finance Corp. v. *Commissioner*, 84 F. (2d) 382 — 12, 15

Jenkins v. *Bitgood*, 101 F. (2d) 57, certiorari denied, 307 U. S. 636 — 14, 15, 16, 19

Jenkins v. *Smith*, 21 F. Supp. 433, reversed, 99 F. (2d) 827 — 19

Kuhn v. *Commissioner*, 34 B. T. A. 274 — 14, 16

LeTulle v. *Scofield*, No. 63, present Term — 16

Lucas v. *American Code Co.*, 280 U. S. 445 — 11

Mellinger v. *United States*, 21 F. Supp. 964 — 15

Menihan v. *Commissioner*, 79 F. (2d) 304 — 13

Miles v. *Safe Deposit Co.*, 259 U. S. 247 — 18

Nelson v. *Commissioner*, 101 F. (2d) 568 — 16

Pinellas Ice & Cold Storage Co. v. *Commissioner*, 287 U. S. 462 — 16

Remington-Rand, Inc. v. *Commissioner*, 33 F. (2d) 77, certiorari denied, 280 U. S. 591 — 19

St. Paul Fire & M. Ins. Co. v. *Garza County W. & M. Ass'n*, 93 F. (2d) 590 — 16

209019—40——1

Cases—Continued. Page

United States v. *Mitchell*, 271 U. S. 9 ..... 11, 12
United States v. *Phellis*, 257 U. S. 156 18
Weis v. *Commissioner*, 13 B. T. A. 1284 ..... 17, 18
Weiss v. *Stearn*, 265 U. S. 242 18

Statutes:

Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 23 2
Sec. 41 3
Sec. 43 3

Miscellaneous:

Treasury Regulations 77, promulgated under the Revenue Act of 1932, Art. 322 3

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 559

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JULIAN PRICE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 11–19) is not reported. The opinion of the Circuit Court of Appeals (R. 32–41) is reported in 106 F. (2d) 336.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 28, 1939. (R. 41.) The petition for a writ of certiorari was filed November 28, 1939, and was granted January 15, 1940. The ju-

risdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer, having agreed to guarantee a bank against certain losses, put his guaranty into bankable form at the request of the bank by giving it his own note for $125,000, endorsing a $125,000 note of a co-guarantor and furnishing collateral to secure both notes. In 1932, when the taxpayer's liability on his guaranty became certain, he gave the bank his own note for $250,000 in return for the two $125,000 notes, the new note being secured by the same collateral held by the bank as security for the old notes. The taxpayer made no payment on the $250,000 note during the year 1932.

The question presented is whether the taxpayer, who was on the cash receipts and disbursements basis, is entitled to a deductible loss for the year 1932 on account of his original note of $125,000.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (e) *Losses by Individuals.*—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and

not compensated for by insurance or otherwise—.

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business;

* * * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *.

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

Regulations 77, promulgated under the Revenue Act of 1932:

ART. 322. *Bases of computation.*—Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with

reasonable consistency. See section 48 for definitions of "paid or accrued" and "paid or incurred." All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. (See sections 42, 43, and 48). For instance, in any case in which it is necessary to use an inventory, no accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See articles 332 and 333.) On the other hand, appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. But see article 105.

STATEMENT

The material facts as found by the Board of Tax Appeals (R. 12–17) may be summarized as follows:

The taxpayer is a resident of Greensboro, North Carolina. During the year 1929 he was president and a substantial stockholder of the Jefferson Standard Life Insurance Company, which company was a large stockholder and depositor in the Atlantic Bank and Trust Company of Greensboro.

The taxpayer himself was also a stockholder of the Atlantic Bank. (R. 12.)

In September, 1929, the Atlantic Bank was merged with several banks and trust companies under the name of North Carolina Bank and Trust Company. Under the plan of merger certain assets of the Atlantic Bank, called "A" assets, were accepted conditionally by the North Carolina Bank and certain other assets, called "B" assets, were pledged to that bank with authority to charge against the "B" assets any losses which might be established in realizing upon the "A" assets. As part of the merger the taxpayer and three other stockholders of the Atlantic Bank executed a guaranty agreement to the effect that, if the North Carolina Bank failed to realize a certain sum from the "A" assets within two years, they would make up the deficiency in an amount not exceeding $500,000. The agreement provided that any sums realized from the "B" assets were to be applied first to any losses occurring in the "A" assets and then to reimbursement of the four guarantors. The period for realizing upon the "A" assets under the terms of the guaranty was subsequently extended with the consent of the guarantors for an additional year, or until September, 1932. (R. 12–13.)

In June, 1931, the president of the North Carolina Bank advised the guarantors that the "B" assets were not in such shape that the Bank could use them to the extent necessary for banking pur-

poses, and requested them to put their guaranty into bankable form so that it could be used by the Bank to obtain credit. In compliance with this request, the taxpayer executed and delivered to the Bank his note for $125,000 and endorsed the note of C. W. Gold, another one of the guarantors, for a like amount. He also deposited collateral security for the payment of these notes. In consideration for the execution of his own notes, the endorsement of Gold's note and the furnishing of the collateral, the Bank agreed that the taxpayer's liability under the guaranty should not be in excess of $250,000. (R. 13–14.)

At the time of this transaction, the "B" assets were still pledged as security for realization on the "A" assets. In August, 1931, they were valued upon an appraisal at $529,947.44, an amount in excess of the guaranty made by the taxpayer and his co-guarantors. By the end of 1931, however, it became apparent that there would be some loss to the guarantors, although the amount of the loss was not definitely known and the guarantors had every reason to believe that they would receive substantial reimbursement from the "B" assets. (R. 14–15.)

In the early part of 1932, financial conditions in Greensboro took a turn for the worse, collections on the "A" and "B" assets declined and it soon became apparent that there was no possibility of recovering anything further from the "B" assets.

Consequently, in the latter part of March, 1932, the North Carolina Bank decided to make collection on the guaranty as to the "A" assets, and called upon the guarantors to make good their guaranty. (R. 15.)

The taxpayer thereupon arranged with the Bank to give the Bank his note for $250,000 in settlement of his own liability and that of Mr. Gold, upon whose note he was endorser. Upon the delivery to the Bank of this $250,000 note, the Bank marked "paid" and turned over to the taxpayer the two $125,000 notes which had been executed under the guaranty agreement. The $250,000 note was secured by the same collateral by which the two $125,000 notes had been secured. Both the taxpayer and the Bank considered this to be a final payment of the two notes given under the guaranty. (R. 15.)

In his tax return for the year 1932, which was filed on the cash receipts and disbursements basis (R. 12), the taxpayer deducted $125,000 as a loss sustained in this transaction, the amount of the deduction being the amount of the note which the taxpayer had executed as maker, as distinguished from the note which he had signed only as endorser.[1] The Commissioner of Internal Revenue

[1] The taxpayer deducted his alleged loss on Gold's note in 1933 and this deduction is not here in controversy. The court below stated with respect to this deduction: "As to the propriety of deferring the latter deduction until 1933, it appears that Gold died in 1932 and it was necessary for taxpayer to look to his estate for reimbursement. Not until

disallowed the deduction and determined a deficiency accordingly. (R. 7–8.) The Board of Tax Appeals sustained the deficiency (R. 17–20), but the court below reversed, holding that the taxpayer had realized the loss in 1932 and was entitled to the deduction. (R. 33–41.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the taxpayer, on the cash receipts and disbursements basis, sustained a deductible loss under the guaranty agreement in March, 1932, when he discharged his obligation thereunder by the delivery of his promissory note secured by collateral.

2. In failing to hold that the taxpayer, on the cash receipts and disbursements basis, sustained no deductible loss under the guaranty agreement in March, 1932, when he discharged his obligation thereunder by the delivery of his promissory note secured by collateral.

3. In holding that the execution and delivery of the taxpayer's note and its accompanying collateral in March, 1932, constituted a payment of the taxpayer's loss under the guaranty agreement in "money or money's worth."

4. In failing to hold that the mere execution and delivery of the taxpayer's note and its accompany-

---

1933 did it become apparent that the estate was insolvent and that taxpayer could expect no reimbursement therefrom." (R. 34–35.)

ing collateral in March, 1932, did not constitute a payment of the taxpayer's loss under the guaranty agreement.

5. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Respondent reported his income on the cash receipts and disbursements basis. On this basis a loss represented by a liability is realized and is therefore deductible only when the liability is paid in cash or its equivalent. The single issue here, therefore, is whether the substitution in 1932 of respondent's new note in place of the note which he gave in 1931, constituted a payment of the original note in cash or its equivalent within the meaning of the revenue act. This issue must be decided adversely to the taxpayer on the authority of *Eckert* v. *Burnet*, 283 U. S. 140, which held that the substitution of one obligation for another, at least when the parties are the same, is not payment for tax purposes when the taxpayer is on the cash basis, regardless of its effect as between the parties.

ARGUMENT

This case does not present the question *whether* the taxpayer is entitled to a deduction. Nor does it involve the determination of whether events have occurred which under some system of accounting would form the basis of a deduction. The sole

question is *when* the deduction is allowable under the system of accounting employed by respondent.[2]

There are, in the main, two leading methods of accounting: the cash receipts and disbursements basis and the accrual basis. Section 41 of the 1932 Act, *supra*, p. 3, requires that net income shall be computed in accordance with the method of accounting regularly employed by the taxpayer. Had respondent used the accrual system, then clearly the deduction here claimed would be allowable in 1932, for on the accrual basis pecuniary obligations payable to or by the taxpayer are treated as if discharged when incurred. But respondent reported his income on the cash receipts and disbursements basis. This basis requires that he report only actual receipts and deduct only actual disbursements.

On the accrual basis, a loss represented by a liability is sustained and is therefore deductible when the liability becomes definitely ascertained (see, *e. g.*, *Burns Mfg. Co.* v. *Commissioner*, 59 F. (2d) 504 (C. C. A. 9th)); on the cash basis, on the other hand, a loss represented by a liability is sustained and is therefore deductible only when the liability is paid in cash or its equivalent. *Eckert* v. *Burnet*,

[2] It is assumed for the purpose of this case that the transaction under review has produced or will produce a deduction that is allowable at some time. However, we do not intend to concede generally that such a deduction would be allowable. It may well be that the payments ultimately made by petitioner should be classified as capital outlays rather than as expenses or losses.

283 U. S. 140; *Burnet* v. *Logan*, 283 U. S. 404, 413; *Burnet* v. *Huff*, 288 U. S. 156, 160–161; cf. *United States* v. *Mitchell*, 271 U. S. 9. Until such payment in cash or its equivalent, the loss is not realized by one on a cash basis, and the income tax law deals only with realized losses. *Lucas* v. *American Code Co.*, 280 U. S. 445, 449; *Burnet* v. *Logan, supra; Ferris* v. *Commissioner*, 38 B. T. A. 312, affirmed without opinion, 102 F. (2d) 985 (C. C. A. 2d).

The single issue here, therefore, is whether the substitution in 1932 of respondent's new note in place of the note which he gave in 1931—the new note being secured by the same collateral as that securing the original note—constituted a payment of the original note in cash or its equivalent within the meaning of the Revenue Act. This issue must be decided adversely to the taxpayer on the authority of *Eckert* v. *Burnet*, 283 U. S. 140.

In the *Eckert* case the taxpayer, who was liable to a bank as endorser of an unsecured note of an insolvent maker, took up the note during the taxable year and substituted therefor his own unsecured note. The Court held that, since the taxpayer was on the cash basis, he could not deduct the amount of the old note as a worthless debt. It pointed out that the taxpayer had made no expenditure during the taxable year of cash or of property having a cash value and consequently, on the cash basis, he realized no loss and would realize no loss until the note was paid.

Under the doctrine of the *Eckert* case, the substitution of one obligation for another, at least when the parties are the same, is not payment for tax purposes when the taxpayer is on the cash basis, regardless of its effect as between the parties. On the cash basis, neither the definite ascertainment of liability (*United States* v. *Mitchell*, 271 U. S. 9; *Burnet* v. *Huff*, 288 U. S. 156, 160; *Insurance Finance Corp.* v. *Commissioner*, 84 F. (2d) 382 (C. C. A. 3d)), nor the recognition of liability through the execution of a promise to pay (*Eckert* v. *Burnet, supra; Burnet* v. *Logan*, 283 U. S. 404, 413; *Hart* v. *Commissioner*, 54 F. (2d) 448 (C. C. A. 1st)) is sufficient to allow a deduction, for neither the existence of an obligation nor a promise to pay an obligation is a payment of cash or its equivalent within the meaning of the statute.

Respondent misconceives the nature of the rule enunciated in the *Eckert* case when he contends that the present case is distinguishable because of the Board's finding that both the taxpayer and the bank considered the execution and delivery of the new note to be a final payment of the original note (R. 15). There is no dispute that, as between the parties, the new note discharged respondent's obligation under the old note. This was also true in the *Eckert* case where the taxpayer, in return for his new note, "received the old notes, marked paid, and destroyed them" (283 U. S. at 141). But the important fact in determining whethe there has

been a loss on the cash basis is not whether an obligation has been discharged—it is rather whether the taxpayer has made any payment in cash or its equivalent to discharge it. That the substitution of a new note for an old note is not a payment in cash or its equivalent, even though it does serve to discharge the old note, is the precise holding of the *Eckert* case. See also *Hart* v. *Commissioner*, 54 F. (2d) 848, 852 (C. C. A. 1st); *Menihan* v. *Commissioner*, 79 F. (2d) 304, 306 (C. C. A. 2d).

The court below sought to distinguish *Eckert* v. *Burnet* on the ground that it related only to the "bad debt" and not to the "loss" provision of the statute (R. 40). The distinction is unsound both in fact and in principle. Examination of the briefs filed in the *Eckert* case reveals that the taxpayer there urged that he was entitled to the deduction either as a bad debt or as a business loss and that the Government contended that he was not entitled to it as either. *Eckert* v. *Burnet*, No. 351, October Term, 1930, Br. for Ptr. pp. 21–22; Br. for Resp. pp. 7–13. And this Court, after holding that the taxpayer was not entitled to a deduction for a bad debt, added (283 U. S. 141–142):

> For the purpose of a return upon a cash basis, there was no loss in 1925. As happily stated by the Board of Tax Appeals, the petitioner "merely exchanged his note under which he was primarily liable for the corporation's notes under which he was secondarily liable, without any outlay of cash or

property having a cash value." A deduction may be permissible in the taxable year in which the petitioner pays cash. The petitioner says that it was definitely ascertained in 1925 that the petitioner would sustain the losses in question. So it was, if the petitioner ultimately pays his note. So was the tax considered in *United States* v. *Mitchell*, 271 U. S. 9, 12, but it could not be deducted until it was paid.

But even were it true that *Eckert* v. *Burnet* related only to the bad debt provision of the statute, that would not alter the result since the principle enunciated is equally applicable to the loss provision. The question is one of the application of accounting principles rather than of construction of the loss or bad debt provisions. In either situation, a deduction is not recognized under the cash basis where the old note is discharged simply by the execution of a substitute note. The controlling fact in each case is that the taxpayer has not made any payment in cash by the execution of the new note and, therefore, the transaction cannot properly be reflected in a return filed on the cash basis.

Several cases in the lower federal courts and in the Board have recognized that the *Eckert* case applies to deductions for losses as well as for bad debts. *Jenkins* v. *Bitgood*, 101 F. (2d) 17 (C. C. A. 2d), certiorari denied, 307 U. S. 636; *Ferris* v. *Commissioner*, 38 B. T. A. 312, affirmed without opinion, 102 F. (2d) 985 (C. C. A. 2d); *Kuhn* v. *Commis-*

sioner, 34 B. T. A. 274. There is a statement to the contrary in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Burns Mfg. Co.* v. *Commissioner,* 59 F. (2d) 504, 507, but this was merely dictum since the taxpayer there was on the accrual basis; in any event, the court did not support its statement by any reasoning or authority and, for the reasons pointed out above, we believe it to be wrong in principle.

The other ground on which *Eckert* v. *Burnet* is sought to be distinguished is that the note there involved was unsecured while here the note was secured. It seems doubtful whether this distinction, if sound, would be available to respondent since the collateral here involved was deposited as security for the original note and was simply retained by the Bank as security for the new note; consequently, respondent did not make any real transfer of property during the taxable year, even as security.

But assuming that respondent did make such a transfer, it would not change the situation since the giving of a secured note is not payment in cash or its equivalent any more than is the giving of an unsecured note. The security makes the promise to pay more easily collectible but it does not transmute the promise itself into payment. *Jenkins* v. *Bitgood,* 101 F. (2d) 17 (C. C. A. 2d), certiorari denied, 307 U. S. 636; *Insurance Finance Corp.* v. *Commissioner,* 84 F. (2d) 382 (C. C. A. 3d); *Mel-*

linger v. *United States*, 21 F. Supp. 964 (C. Cls.); *Kuhn* v. *Commissioner*, 34 B. T. A. 274. The taxpayer remained owner of the collateral (*St. Paul Fire & M. Ins. Co.* v. *Garza County W. & M. Ass'n*, 93 F. (2d) 590, 592 (C. C. A. 5th); *Goldstein* v. *Rusch*, 56 F. (2d) 10, 11–12 (C. C. A. 2d); *Nelson* v. *Commissioner*, 101 F. (2d) 568, 571 (C. C. A. 8th); *Ball-Thrash* v. *McCormick*, 162 N. C. 471) and the Bank acquired only a possessory interest therein, with the right to sell on default in payment of the note. *City Bank Farmers' Trust Co.* v. *Bowers*, 68 F. (2d) 909, 913 (C. C. A. 2d). Clearly, therefore, the deposit of the collateral cannot be treated as the payment of cash or of property having a cash value.

Pinellas Ice & Cold Storage Co. v. *Commissioner*, 287 U. S. 462, upon which respondent relies, is not opposed to this view. The Court there simply held that when property is sold or exchanged for well-secured notes, the notes are properly regarded as the equivalent of cash rather than as securities within the intendment of the reorganization provisions of the Revenue Act.[3] But, as the Circuit Court of Appeals for the Second Circuit pointed out in *Jenkins* v. *Bitgood*, *supra*, it does not follow from this that they must be regarded as the equiva-

[3] The principle has been extended to cover long term obligations in *LeTulle* v. *Scofield*, No. 63, present Term, decided January 2, 1940. Yet if the obligor in the *LeTulle* case were on the cash basis, it could hardly be said that the obligations were paid when issued.

lent of cash when the taxpayer is the maker of the notes and the question is whether he has made a cash payment by delivery of them. The recipient of a well-secured note may at any time negotiate it and receive its value and, therefore, so far as he is concerned, the note may well be regarded as the equivalent of cash. The same is true of the holder of an unsecured note executed by an amply solvent maker. But in neither situation does the maker of the note make a cash payment until he actually liquidates his obligation and consequently, so far as he is concerned, the note cannot be regarded as the equivalent of cash.

The court below relied strongly upon *Crain* v. *Commissioner,* 75 F. (2d) 962 (C. C. A. 8th), and *Weis* v. *Commissioner,* 13 B. T. A. 1284, in support of its conclusion. Both cases are entirely distinguishable. In the *Crain* case the taxpayer and one Wesson became obligated to pay obligations of a corporation in which they were stockholders in the sum of $80,000. In 1916 Wesson paid the $80,000 in cash and took the taxpayer's note for $40,000, which the taxpayer did not pay until 1919. The court held that the loss was deductible in 1916, when the creditor was paid, and not in 1919 when the taxpayer paid the note held by Wesson. This holding was predicated upon the theory, entirely consistent with our view here, that in substance the taxpayer had borrowed $40,000 from Wesson and had paid his obligations to his creditors in cash; having made

a cash payment, he did not forfeit his deduction simply because he had acquired the cash with which to make the payment through borrowing from a third person. Similarly, in the *Weis* case, the Board held that a taxpayer who had made an investment was entitled to deduct the investment as a loss in the year in which it became worthless, even though the funds invested had been borrowed.

Under the rule of the *Crain* and *Weis* cases, the respondent here would have been entitled to a deduction if he had paid the notes to the bank in cash, despite the fact that he had borrowed the cash from a third party. But plainly it does not follow from the fact that respondent might have been able to arrange his affairs so as to make a cash payment that he is entitled to a deduction when he fails to make such a payment. Tax liability often varies according to the form which a transaction takes. For example, the taxpayer in *Eckert* v. *Burnet*, like the taxpayer here, might have borrowed money from a third party, paid his note in cash and thus have become entitled to the deduction; this possibility, however, does not affect the incidence of the tax statute upon the transaction which actually occurred. As this Court has frequently pointed out, questions of taxation are not determined by viewing what might have been done but by viewing what was done in fact. *Weiss* v. *Stearn*, 265 U. S. 242, 254; *Miles* v. *Safe Deposit Co.*, 259 U. S. 247; *United States* v. *Phellis*, 257 U. S. 156, 172;

Remington-Rand, Inc. v. *Commissioner,* 33 F. (2d) 77, 78 (C. C. A. 2d), certiorari denied, 280 U. S. 591.

Jenkins v. *Smith,* 21 F. Supp. 433 (D. Conn.), reversed on other grounds, 99 F. (2d) 827 (C. C. A. 2d), does lend support to the decision below. However, that case is of dubious authority in the light of the decisions of the Circuit Court of Appeals for the Second Circuit in *Jenkins* v. *Bitgood, supra,* and *Ferris* v. *Commissioner, supra.*

CONCLUSION

The decision below tends to impair the fundamental distinction between taxation on the cash and on the accrual bases of accounting. The decision is in conflict with both principle and authority and should therefore be reversed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
BERRYMAN GREEN,
Special Assistants to the Attorney General.
RICHARD H. DEMUTH,
Special Attorney.

FEBRUARY, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940